

A **KUMPULAN PERUBATAN (JOHOR) SDN BHD v. DR MOHD
ADNAN SULAIMAN & ANOR**

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA

B MAH WENG KWAI JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-1702-08-2013]
5 JANUARY 2015

C **CONTRACT:** *Joint venture – Joint venture agreement – Breach of – Relationship of parties – Whether fiduciary relationship existed – Whether parties contractually obligated to ensure joint venture objective prospered – Setting up of entity to rival business of joint venture – Whether joint venture agreement contained any competition clause – Whether fundamentally breached joint venture agreement – Whether there was conflict of interest – Loss of future profits – Whether proved*

D **CONTRACT:** *Breach – Damages – Joint venture agreement – Loss of future profits – Appeal against award by High Court – Whether damages awarded by High Court based on mere estimations and projections – Whether losses suffered within reasonable contemplation of parties*

E The first respondent, a medical doctor, had set up a private hospital. Two years later, he and the second respondent entered into a 'Joint Venture Agreement Incorporating Shareholders Agreement' ('JVSA') with the appellant, a company involved in the running of private hospitals. The JVSA was entered into as to incorporate a limited liability company ('Hospital Penawar Sdn Bhd') to run a private hospital, Hospital Penawar ('HP').
F The second respondent was appointed as its director and administrator. The respondents held a 70% shareholding in Hospital Penawar Sdn Bhd while the appellant held the remaining 30%. Under the JVSA, the appellant was obliged to provide financial and other support to achieve the objectives of the JVSA. The respondents later discovered that the appellant was in the process
G of setting up a new hospital which was located less than a kilometre away from HP. When the JVSA was entered into, HP was the only hospital within a 5-kilometre radius. The respondents objected to this since the new hospital would be offering the same services within the same area and would be unfairly competing with HP. The respondents then sued the appellant for
H breach of the express and implied terms of the JVSA; breach of fiduciary duties; and for loss of future profits. In agreement with the respondents, the High Court allowed the claims and made the orders for (i) a declaration that the appellant was in breach of the JVSA; (ii) a declaration that the appellant was in breach of its fiduciary duties; and (iii) an order that a sum of
I RM70,486,000 was to be paid as damages by the appellant to the respondents with costs in the sum of RM150,000. Hence, the present appeal. The appellant submitted that (i) only Hospital Penawar Sdn Bhd, as the affected company, could be the proper plaintiff to sue for projected loss of profits, not

the respondents who were mere shareholders; (ii) no fiduciary relationship existed between the shareholders and the JVSA did not contain any competition clause; (iii) the damages for loss of profits could not be said to be a claim for special damages; and (iv) the calculations of the award of RM70,486,000 were based on estimates and projections.

Held (allowing appeal; setting aside order of High Court)

Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

- (1) The issue of 'proper party' contained no merit and was essentially an issue of law that did not require the adduction of additional evidence beyond what had already been received during trial. It was within the court's discretion to allow the submissions in the interest of justice. (para 43)
- (2) In determining that a fiduciary relation must be a *sine qua non* of a joint venture agreement, the High Court failed to sufficiently appreciate that on the facts of this case, the joint venture agreement was in the nature of a commercial joint venture, in which case, it was incumbent on the High Court to have determined the exact contractual terms binding the parties. It is best for the commercial conflicts between the parties to be resolved through the mechanisms provided in the JVSA itself and not supplant these contractual provisions by equitable doctrines. (paras 41 & 44)
- (3) The High Court had failed to sufficiently consider the fundamental principle of company law that shareholders are only entitled to dividends declared out of profits within the terms of the governing articles of association, even in the context of joint venture. The total dividends declared by HP between the years 2008 and 2011 came only to an average of RM1,120,308 per year for the four years. These were actual audited figures. It was difficult to accept that the respondents could then recover projected profits even on the lower scale of RM70,486,000 for 16 years (paras 37 & 44).
- (4) The report adduced by the respondents was based on assumptions, estimates and projections that had not been independently verified. Being based on estimated losses and projections, the sums claimed as loss of profits could not be classified as 'special damages' for the short reason that they had not been actually incurred, nor capable of exact calculation. The respondents' claim in this regard was fundamentally flawed. (para 38)

Bahasa Malaysia Translation Of Headnotes

Responden pertama, seorang doktor perubatan, telah menubuhkan sebuah hospital swasta. Dua tahun kemudian, dia dan responden kedua memasuki 'Perjanjian Usahasama Menubuhkan Perjanjian Pemegang-pemegang Saham' ('JVSA') dengan perayu, sebuah syarikat yang terlibat dengan pengurusan hospital-hospital swasta. JVSA dimeterai untuk menubuhkan syarikat

- A liabiliti terhad ('Hospital Penawar Sdn Bhd') untuk menguruskan sebuah hospital swasta, Hospital Penawar ('HP'). Responden kedua dilantik menjadi pengarah dan pentadbirnya. Responden-responden memegang 70% pegangan saham dalam Hospital Penawar Sdn Bhd manakala perayu memegang baki 30%. Di bawah JVSA, perayu berkewajipan memperuntukkan sokongan kewangan dan lain-lain sokongan untuk mencapai objektif-objektif JVSA.
- B Responden-responden kemudiannya mendapati bahawa perayu dalam proses untuk menubuhkan hospital baru yang terletak kurang daripada 1 kilometer dari HP. Semasa JVSA dimeterai, HP merupakan satu-satunya hospital dalam radius 5 kilometer. Responden-responden membantahnya kerana hospital baru tersebut akan menawarkan perkhidmatan-perkhidmatan yang sama dalam kawasan yang sama dan akan bersaing dengan HP secara tidak adil. Responden-responden kemudiannya menyaman perayu bagi pelanggaran terma-terma nyata dan tersirat JVSA; pelanggaran kewajipan-kewajipan fidusiari; dan bagi kehilangan keuntungan masa hadapan.
- C Bersetuju dengan responden-responden, Mahkamah Tinggi membenarkan tuntutan-tuntutan dan mengeluarkan perintah-perintah (i) pengisytiharan bahawa perayu melanggar JVSA; (ii) pengisytiharan bahawa perayu melanggar kewajipan-kewajipan fidusiarnya; dan (iii) satu perintah agar RM70,486,000 dibayar sebagai ganti rugi oleh perayu kepada responden-responden dengan kos berjumlah RM150,000. Oleh itu, rayuan ini. Perayu
- D menghujahkan bahawa (i) hanya Hospital Penawar Sdn Bhd sahaja, sebagai syarikat yang terjejas, boleh menjadi plaintif yang sepatutnya menyaman bagi kerugian unjuran keuntungan, bukan responden-responden yang cuma pemegang-pemegang saham; (ii) tiada hubungan fidusiari yang wujud antara pemegang-pemegang saham dan JVSA tidak mengandungi sebarang klausa persaingan; (iii) ganti rugi bagi kehilangan keuntungan tidak boleh disifatkan sebagai tuntutan bagi 'ganti rugi khas'; dan (iv) pengiraan-pengiraan award berjumlah RM70,486,000 adalah berdasarkan anggaran dan unjuran.
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Diputuskan (membenarkan rayuan; mengeneipikan perintah Mahkamah Tinggi)

- G **Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:**

- (1) Isu 'pihak yang sepatutnya' tidak mengandungi merit dan pada dasarnya, merupakan satu isu undang-undang yang tidak memerlukan pengemukaan keterangan tambahan melebihi apa yang telah diterima ketika perbicaraan. Ia adalah dalam budi bicara mahkamah untuk membenarkan hujahan-hujahan demi kepentingan keadilan.
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- (2) Dalam menentukan hubungan fidusiari mestilah menjadi intipati satu perjanjian usahasama, Mahkamah Tinggi gagal mempertimbangkan secukupnya bahawa berdasarkan fakta-fakta kes ini, perjanjian usaha sama tersebut bersifat usahasama komersil, yang mana, adalah perlu untuk Mahkamah Tinggi putuskan terma-terma sebenar kontrak yang mengikat pihak-pihak. Adalah terbaik sekiranya konflik-konflik
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komersil antara pihak-pihak diselesaikan melalui mekanisme-mekanisma yang diperuntukkan dalam JVSA sendiri dan bukan menggantikan peruntukan-peruntukan kontrak ini dengan doktrin-doktrin keseksamaan.

- (3) Mahkamah Tinggi gagal untuk mempertimbangkan secukupnya akan prinsip-prinsip asasi undang-undang syarikat bahawa pemegang-pemegang saham hanya berhak kepada dividen-dividen daripada keuntungan berdasarkan terma-terma perkara-perkara persatuan yang mengawal, walaupun dalam konteks usahasama. Jumlah dividen yang diisytiharkan oleh HP antara tahun 2008 dan 2011 hanyalah berpuratakan RM1,120,308 setahun bagi empat tahun tersebut. Ini adalah angka-angka sebenar yang telah diaudit. Adalah sukar untuk menerima bahawa responden-responden boleh mendapat keuntungan unjuran walaupun pada skala rendah RM70,486,000 untuk 16 tahun.
- (4) Laporan yang dikemukakan oleh responden-responden adalah berdasarkan andaian, anggaran dan unjuran yang tidak disahkan secara bebas. Oleh kerana ia adalah berdasarkan kerugian yang dianggarkan dan diunjurkan, jumlah-jumlah yang dituntut sebagai kehilangan keuntungan tidak boleh diklasifikasikan sebagai 'ganti rugi khas' atas sebab mudah bahawa kesemuanya belum ditanggung mahupun boleh dikira. Tuntutan responden-responden berkenaan ini, pada dasarnya, adalah cacat.

Case(s) referred to:

- Crossco No 4 Unlimited v. Jolan* [2011] EWCA Civ 1619 (*refd*)
- Foss v. Harbottle* [1843] 2 Hare 461 (*refd*)
- Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors* [1991] 2 CLJ 1243; [1991] 4 CLJ (Rep) 833 HC (*refd*)
- Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC (*refd*)
- Hospital Products Ltd v. United States Surgical Corporation & Ors* [1984] 156 CLR 41 (*refd*)
- In Re Kang Chong Yeow; Ex P Mivan Far East Sdn Bhd* [2001] 8 CLJ 226 HC (*refd*)
- Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 CA (*refd*)
- Macaura v. Northern Assurance Co Ltd & Others* [1925] AC 619 (*refd*)
- Murad v. Al-Saraj* [2004] EWHC 1235 (Ch) (*refd*)
- Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC (*refd*)
- Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750 CA (*refd*)
- Peter's American Delicacy Co Ltd v. Heath* [1939] 61 CLR 457 (*refd*)
- Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor & Other Appeals* [2012] 5 CLJ 169 CA (*refd*)
- Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 (*refd*)
- Ross River Limited & Blue River Limited Partnership v. Waveley Commercial Limited & Ors* [2013] EWCA Civ 910 (*refd*)
- Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607 CA (*refd*)
- United Dominions Corp Pty v. Brian Pty Ltd* [1985] ALJR 676 (*refd*)

A Legislation referred to:

Contracts Act 1950, ss. 40, 74(1)

Evidence Act 1950, s. 45

For the appellant - Alex De Silva (S Shamalah & Izzat Othman with him); M/s Bodipalar Ponnudurai De Silva

B For the respondents - Mohammad Adam Abdullah (Faizah Mohamed Aris & S Maniarasan with him); M/s Adam Abdullah & Mani

[Editor's note: For the High Court judgment, please see Dr Mohd Adnan Sulaiman & Anor v. Kumpulan Perubatan (Johor) Sdn Bhd [2013] 7 CLJ 1032 (overruled).]

Reported by Najib Tamby

C

JUDGMENT

Mohamad Ariff Yusof JCA:

The Parties And Introductory Facts

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[1] The High Court entered judgment against the appellant (the defendant below) for breach of the express and implied terms of an agreement described as “Joint Venture Agreement Incorporating Shareholders Agreement” (hereafter “JVSA”) dated 30 May 1995, entered into between the appellant and the two respondents (the plaintiffs below). The appellant is a company
E incorporated to primarily carry on business of managing agents for hospitals, clinics, maternity and nursing homes in Malaysia or elsewhere, and to provide administration, management, financial advice and other services to these hospitals and clinics. The first and second respondents are siblings; the first respondent is a medical doctor whilst the second respondent is an
F accountant by profession.

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[2] The JVSA was entered into so as to incorporate a limited liability company – Hospital Penawar Sdn Bhd – to run a private hospital known as Hospital Penawar which was set up with an initial capacity of 40 beds together with diagnostic facilities for inpatients and outpatients. Hospital
G Penawar, as a privately-run hospital, commenced operation in 1997, but had existed earlier under a different name – (Hospital Adnan Sulaiman Sdn Bhd) – and a different ownership. Pursuant to the JVSA, the respondents together hold 70% of the shareholding (first respondent: 45%; second respondent: 25%) in the joint venture company managing the private hospital. The
H appellant holds the remaining 30%. At board level, the respondents has a controlling majority, with two directors appointed by the first respondent, one by the second respondent and two by the appellant. The second respondent has been appointed the managing director of the company since September 2008.

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[3] Sometime in October 2009, the respondents discovered, through “market talk”, that the appellant was setting up another private hospital called “Pasir Gudang Specialist Hospital Sdn Bhd” (“new hospital”) within

a 1km radius from Hospital Penawar, and offering the same medical services. The respondents objected to this since the new hospital would be offering the same services within the same area and would be unfairly competing with Hospital Penawar. There would arise a conflict of interest on the part of the appellant. The appellant, however, argued that contractually there was no provision to prohibit competition between them, there were sufficient safeguards in the JVSA to prevent conflicts of interest, and there was a sufficient market in the Pasir Gudang area to cater for both. The respondents then sued the appellant for breach of the express and implied terms of the JVSA, breach of fiduciary duties on the part of the appellant, and for loss of future profits.

[4] The recital in the JVSA specifies, *inter alia*, that the parties “are desirous of combining their respective resources and expertise for their mutual benefit in the business”, “are desirous of forming a joint venture company ... for the purpose of pursuing and effecting the aforesaid intentions”, and that the parties “have agreed that the JVC shall carry on the business of establishing and managing a private hospital having an initial capacity of 40 beds and including diagnostic facilities on inpatients and outpatients”. Under art. IV of the JVSA, the appellant represents, warrants and covenants that it “shall assist in the incorporation of the JVC and to obtain all relevant approval required for the incorporation of the JVC”, and further that it “shall provide financial and other support in pursuance of the objectives of the JVC”. The respondents, on their part, agree that they “shall undertake the necessary marketing and promotion to ensure the smooth running of the business”, and “shall provide financial and other support in pursuance of the objectives of the JVC”. Article XVIII, cl. 4 in turn provides that “in all cases they shall each of them use their best endeavours to ensure that this agreement shall operate as between themselves fairly and equitably”.

[5] It was not disputed that the appellant was in the business of managing and providing services to privately-run hospitals, and that it has a very large capitalisation of RM4 billion.

The Decision Of The High Court

[6] In the High Court below, judgment in favour of the respondents/ plaintiffs was entered after a full trial, for the following orders (1) a declaration that the appellant/defendant in constructing and establishing the Pasir Gudang Hospital Sdn Bhd was in breach of the express and implied terms of the JVSA, (2) a declaration that the defendant’s action in constructing and establishing the said Pasir Gudang Hospital Sdn Bhd constituted a breach of fiduciary duties of the defendant to the plaintiffs, and (3) an order that a sum of RM70,486,000 was to be paid as damages by the defendant to the plaintiffs with interest at 5% per annum on that amount as from 1 May 2013 until full satisfaction. Costs of RM150,000 were ordered against the defendant.

A The Pleadings For Damages And Declaration

[7] As far as the pleadings are concerned, the prayers for relief in the statement of claim read:

- B** 28. Selanjutnya dan/atau secara alternative, penglibatan Defendan di dalam Hospital Baru merupakan pemecahan terma-terma dan/atau syarat-syarat tersurat dan/atau tersirat Perjanjian tersebut. Selanjutnya dan/atau secara alternatif, penglibatan Defendan di dalam Hospital Baru merupakan pemecahan tugas-tugas fidusiari Defendan kepada Plaintiff-Plaintif.
- C** 30. Tindakan-tindakan Defendan seperti yang dinyatakan di atas telah dan akan mengakibatkan kerosakan kepada Plaintiff-Plaintif.
- Butir-butir kerugian khas
- Kehilangan keuntungan untuk jangka masa 26 tahun RM91,124,000.00
- D** 31. Oleh yang demikian, Plaintiff-Plaintif memohon penghakiman terhadap Defendan seperti berikut:
- E** i. Deklarasi bahawa tindakan Defendan di dalam pembinaan dan pengusahaan Hospital Baru ... adalah merupakan dan/atau terjumlah kepada pemecahan terma-terma tersurat dan tersirat Perjanjian tersebut ...;
- ii. Deklarasi bahawa tindakan Defendan di dalam pembinaan dan pengusahaan Hospital Baru ... adalah merupakan dan/atau terjumlah kepada pemecahan tugas-tugas fidusiari Defendan kepada Plaintiff-Plaintif.
- F** Bahawa Defendan membayar wang sejumlah RM91,124,000.00 sebagai gantirugi akibat pemecahan kontrak;
- iv. Gantirugi am;
- v. Faedah pada kadar 4% setahun atas jumlah wang yang diawadkan oleh Mahkamah yang Mulia ini dari tarikh yang difikirkan sesuai sehingga ke tarikh penyelesaian penuh ...

G [8] From the terms of the pleadings, it will thus be seen that the High Court awarded “special damages” at the lower figure of RM70,486,000.

[9] The joint venture company itself (Hospital Penawar Sdn Bhd) was not named as a party in the litigation, the action being between the immediate joint venturers.

H Decision Of This Court

I [10] After hearing submissions by counsel of the parties, and considering the evidence and the law as disclosed in the appeal record, we came to a unanimous finding that there were serious misdirections in law by the High Court which invited appellate intervention by us, and thus we allowed the appeal with costs.

[11] The respondents filed a cross-appeal as well, by which they appealed against the order of the High Court on the quantum of damages awarded, stating that it should have been the higher sum of RM91,124,000, as pleaded by them, and disclosed in the “expert’s” report tendered to court. The cross-appeal was also consequently dismissed.

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[12] We now provide our full grounds.

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The High Court’s Grounds Of Judgment

[13] In a comprehensive judgment that explored the legal position of parties in a joint venture, the High Court came to a firm finding, based principally on the Supreme Court decision in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474, that the relationship between these parties was fiduciary in nature. The court rejected the argument that this outcome had to be dependent on the existence of a partnership, but opted for the broader proposition that a fiduciary relationship was a *sine qua non* of any joint venture arrangement, borrowing freely from an online dictionary definition (“*The Free Dictionary*”) which described a joint venture as such. This definition was said to be in accord with the decision in *Newacres Sdn Bhd*, *supra*. The High Court held at p. 11 of the judgment:

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In *The Free Dictionary* by Farlex which is accessible online the term “Joint Venture” is defined to mean an association of two or more companies or individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation. It goes on to say, amongst others, that each joint venture has a fiduciary responsibility towards the other joint members, owes a duty of care to the other members, and has a duty to act in good faith in matters that concern the common interest of the joint venture undertaking. I accept this to be an accurate description of a joint venture. It accords with the decision of the Supreme Court in *Newacres* and the authorities cited therein. A fiduciary responsibility is therefore a *sine quo non* in any JV Agreement. On the fact pattern of the present case it is clear to me that the plaintiffs and the defendant are in a fiduciary position as between themselves.

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[14] In contrast with this broad proposition, the High Court appeared also to rely on the Court of Appeal decision in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607; [1996] 2 MLJ 265, where the Court of Appeal outlined the factors that were indicative of a fiduciary relationship, namely, (a) the existence of a relationship of confidence which may be abused, (b) inequality of bargaining power, and (c) instances of vulnerability. The High Court in fact acknowledged that “whether or not a fiduciary relationship exists depends on the facts of the case and that the categories of fiduciary duties are never closed” (at p. 9 of the judgment). As for the scope of fiduciary duties in the context of joint ventures, the High Court again relied on *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals*, *supra*,

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- A and its approval of the minority judgment of Mason J in the Australian High Court case of *Hospital Products Ltd v. United States Surgical Corporation & Ors* [1984] 156 CLR 41, and the proposition that “it is now acknowledged generally that the scope of fiduciary duty must be moulded according to the nature of the relationship and the facts of the case”. Delving into the scope of fiduciary duties between the appellant and the respondents on the facts, the learned trial judge concluded as follows:

- C What then is the scope of the fiduciary duties between the plaintiffs and the defendant? The answer lies within the four walls of the JV Agreement, the pillar of which is the parties’ objective aim or purpose, which is to combine their respective resources and expertise “for their mutual benefit in the business” of Hospital Penawar and not, it will be noted for their mutual benefit in the business of the defendant, Kumpulan Perubatan (Johor) Sdn Bhd or any other party. By the terms of the JV Agreement, the parties are under a contractual obligation to prosper Hospital Penawar and not act to its detriment. That obligation is sacrosanct and anything done to the contrary by any party to the Agreement would be a violation of that obligation, ... Clearly the defendant owes a fiduciary duty to the plaintiffs as fellow members in the joint venture. It would be contrary and repugnant to the spirit of the JV Agreement for the defendant to do any act that is detrimental to the interests of the JVC to which it owes a duty to act in the utmost good faith in all matters that concern the common interest of the joint venture. It cannot be an act in good faith, let alone in the common interest of the joint venture for the defendant to set up a rival hospital to compete with the joint venture hospital and to the detriment of the plaintiffs who are small players in the whole scheme of things. If the defendant’s argument were to be followed to its logical conclusion, then technically there would be no legal impediment for the defendant to set up a hospital next to Hospital Penawar. That cannot be by any stretch of the imagination be an eventuality that was within the contemplation of the parties when they entered into the JV Agreement. On the contrary that would be an eventuality that they had impliedly discounted (at pp. 12 - 13 of the Judgment).

- G [15] While acknowledging the agreement did not contain a guarantee of profits, nevertheless in the view of the High Court, the appellant could not act in a way that undermined “the very foundation” of the fiduciary relationship which was “based on mutual trust and confidence”. To the High Court, the conflict of interest was obvious since the appellant as a shareholder would have access to pricing information, business modules and trade secrets of the JVC. In short, the trial judge said, “the competition will be on unfair terms as the defendant is privy to all confidential information on Hospital Penawar which it could use to its advantage whereas the plaintiffs do not have such advantage over the new hospital”, citing supporting propositions of law established in *United Dominions Corp Pty v. Brian Pty Ltd* [1985] ALJR 676 and *Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors* [1991] 2 CLJ 1243; [1991] 4 CLJ (Rep) 833; [1991] 2 MLJ 428.

[16] Noting that three out of 12 consultants of Hospital Penawar had been “lured” by the new hospital, and as at the date of trial, six consultants had tendered their resignations from Hospital Penawar, and as at 2013, five specialists had tendered their resignations, the learned trial judge concluded that there could be no doubt that the new hospital was a threat to Hospital Penawar, and “by extension” to the respondents who were the majority shareholders.

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[17] The High Court dismissed the argument, as testified by SD1 (the Corporate Manager of the appellant), that the new hospital was not a threat to Hospital Penawar, but was “complementing” the services of the latter. In the same vein, the High Court dismissed the argument that the “zoning approval” granted to the appellant by the Ministry of Health showed that the healthcare facilities available in the Pasir Gudang area were insufficient and therefore there was a need for an additional hospital. The High Court stated:

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With due respect, I do not see the relevance of the point in relation to the JV Agreement. In the first place the defendant witnesses themselves confirmed that the Director General of Health is not concerned with any breach of the JV Agreement in considering the defendant’s application to set up the new hospital. Further and in any event, the Director General of Health and the Ministry of Health are not parties to the JV Agreement. There is therefore no nexus between the point taken and the question whether the defendant had breached the Agreement (at pp 20 - 21 of the Judgment).

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[18] Having found for the respondents on the issue of liability, the High Court adopted the lower amount proposed as foreseeable and recoverable damages by the report by SP4 (Andrew Heng) – the Ferrier Hodgson MH Report (“FHHM Report”). The court accepted SP4, a chartered accountant and a member of the Malaysian Bar, as an expert, and noted that the report had not been challenged by any other expert, the appellant having failed to call their own expert.

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[19] The quantum of damages was pegged to projected loss of profits expected to be suffered by Hospital Penawar for a period of 16 years (2013 to 2029) based on a factor of 70% of shareholding. The 16 years’ duration was arrived at on the basis that it would take Hospital Penawar between approximately 16 to 19 years to revert to its original business level prior to the establishment of the new hospital. The starting basis was the income statement forecast for year ending 2013 to year ending 2029, and a gross profit margin of between 29% and 35%. The High Court analysed SP4’s calculations as follows:

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SP4 was appointed by the plaintiffs as an Independent Advisor to determine the potential losses suffered by Hospital Penawar due to the breach of the JV Agreement. His testimony is that the Income Statement forecast for Hospital Penawar was for the year ending 2013 to the year ending 2029, ie, a projection of 16 years. His estimation of the potential

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- A loss to the plaintiffs based on their 70% share for that period is a minimum of RM70.486 million to a maximum of RM91.124 million. SP4's basis for calculating the loss for 16 years is due to the fact that the projected loss of business for Hospital Penawar will be between the range of 50% to 70%. Following this loss, with the projected growth of 8% and factoring a price increase of 3% and a real growth rate of 5%, it will take Hospital
- B Penawar approximately 16 to 19 years to revert back to its original business level prior to the establishment of the new hospital, hence the conservative acceptance of 16 years by SP4. He reviewed past trends of Hospital Penawar's profits and the Income Statements provided by the plaintiffs. From the documents, he noted that between financial years
- C 2008 and 2012, Hospital Penawar had recorded a Gross Profit Margin of between 29% and 35% (p. 27 of the Judgment).

[20] The HRMH Report itself, in analysing the "Market Share post commencement of PGSH will vary from 30% to 50%", states as follows:

- D Management has represented that their main market is within a 5 km radius. However we note that there is another hospital namely Regency Hospital located approximately 6 km away in 2008 which had already affected the sales growth despite being 6 km away.
- E With the establishment of PGSH [Pasir Gudang Specialist Hospital], a "two-supplier" market will be created, affecting the business of HPSB. A range of between 30% market share to 50% market share has been used as to possibly mimic the effects of the new hospital on HPSB.
- F In the best case scenario, we assume that the business will be most affected in the first two years, then tapering off and holding steady at a 50% market share beginning year 5 as both hospitals are aiming for the same market and providing the same services.
- G In the worst case scenario, we assume that the business will be most affected in the first two years then tapering off to a steady 45% market share as PGSH's holding company KPJ has an extensive customer base and a stronger brand name.
- We are of the opinion that the market share assumption used here are fair and reasonable.

- H [21] The actual calculations and workings based on these "assumptions" are detailed in Annexure 7 of the report (pp. 1154 -1156, appeal record, Part C). In the "maximum loss" scenario, for years 2014, 2015, 2016, 2017 and 2019, the calculations project losses for the hospital's profit after tax, on the basis of a drop in revenue of 60%, 70%, 65%, 60% and 55%. These assumptions and projected figures are expressly mentioned in the report as based on copies of financial statements and audit reports of Hospital Penawar from 1997 to 2011 and an excel copy of the income statement forecasts/
- I projections from 2012 to 2019 supplied by the respondents. At p. 999, appeal record, Part C, the HRHM report candidly states:

We have assumed and relied upon **without independent verification**, the accuracy and completeness of information that was publicly available or supplied or otherwise made available to us by the Plaintiffs, which such information formed a substantial basis of our quantification of the estimated damages or losses suffered by HPSB. (emphasis added)

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[22] As noted earlier in this judgment, the High Court adopted the lower estimated figure, but it appeared to us that no specific reason was given, or explained by the learned trial judge, why the lower figure was chosen.

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The Submissions

The Appellant's Submission

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[23] In summary, the appellant's submission was pitched on the fundamental point in company law that only the affected company (Hospital Penawar Sdn Bhd) could be the proper plaintiff to sue for projected loss of profits caused to it by the setting up of the new hospital by the defendant, not the respondents who were mere shareholders entitled merely to dividends out of the profits, if and when declared by the company. Unless their personal rights are directly affected, they could only institute this action by way of a derivative action in a situation where the directors or the controllers of the company failed or refuse to sue for the projected loss of profits, but, on the facts here, the respondents were in a dominant position in the administration of the company, both at shareholders' and board level. Our attention was particularly drawn to the decision of this court in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor & Other Appeals* [2012] 5 CLJ 169, where similarly the claim was brought by Ho Hup Construction Company, a 70% shareholder of a company, Bukit Jalil Development Sdn Bhd, that entered into a development agreement with the defendant company, Pioneer Haven Sdn Bhd, to rescind the development agreement on the ground, *inter alia*, that prior shareholders' approval had not been obtained for the agreement to be entered into. In *Pioneer Haven*, *supra*, it was held:

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We are unable to comprehend as to how Ho Hup suffered such that it is entitled to commence this suit in its personal right. Even if Ho Hup took the position that the entering into the JDA had caused diminution in the market value of its shares, we are unable to see how this can overcome the corporate impediment, reinforced over and over again, in various authorities, that of the "proper plaintiff" rule. In a well-known passage in *Prudential v. Newman*, the court observed that:

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... But what the shareholder cannot do is to recover damages merely because the company in which he is interested has suffered damages. It cannot recover a sum equal to the diminution in the market value of its shares, or equal to the likely diminution in dividend, because such a loss is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only loss is through the company, in the

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- A diminution of the net assets of the company in which he has (say)
a 30% shareholding. The plaintiff's share are merely a right of
participation in the company on the terms of articles of association
...
- B In our view the commencement of this action by Ho Hup in its personal
right is tantamount to Ho Hup misappropriating Bukit Jalil's chose in
action, namely, any cause of action which Bukit Jalil has against the
defendants ... (p. 647 of the Report, per Zainun Ali JCA, as Her Ladyship
then was, applying *Macaura v. Northern Assurance Co Ltd & Others, supra*).
- C [24] This was an argument reverting to basic principles of company law as
laid down in *Foss v. Harbottle* [1843] 2 Hare 461, as clarified further in
Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2) [1982] 1 All ER
354, that a shareholder cannot sue to enforce a company's rights, unless his
personal rights are infringed. On the facts of this appeal, the calculation of
damages was based on projected losses to Hospital Penawar, and thus the
proper plaintiff should be that company.
- D [25] Coupled with this argument was the other argument advanced that a
shareholder is not entitled to claim for profits made by the company; he is
entitled to only claim for dividends out of the profits when declared. Profits
are the assets of the company, not of the shareholder. Counsel referred us to
the following authorities: *Macaura v. Northern Assurance Co Ltd & Others*
[1925] AC 619; *In Re Kang Chong Yeow*; *Ex P Mivan Far East Sdn Bhd* [2001]
8 CLJ 226; [2001] 3 MLJ 98; *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ
1325; [1992] 1 CLJ (Rep) 120; [1992] 2 MLJ 189; *Perman Sdn Bhd & Ors v.*
European Commodities Sdn Bhd & Anor [2005] 4 CLJ 750; [2006] 1 MLJ 97.
In particular, this court held in *Perman Sdn Bhd, supra*, approving *Macaura v.*
Northern Assurance Co Ltd & Others, supra, that a principle which lies at the
heart of company law is that a company is a separate legal person from its
shareholders, and that the shareholders "have no interest, legal or beneficial
over the property of the former". In *Macaura v. Northern Assurance Co Ltd &*
Others, supra, the House of Lords held:
- G Now, no shareholder has any right to any item of property owned by the
company, for he has no legal or equitable interest therein. He is entitled
to a share in the profits while the company continues to carry on business
and a share in the distribution of the surplus assets when the company
is wound up (at p. 626 - 627 of the Report, per Lord Buckmaster).
- H [26] On the breach of fiduciary duties claimed by the respondents, the
appellant denied a fiduciary relationship existed between the shareholders,
or even between the appellant, as shareholder, and the company, citing in
support the Australian case of *Peter's American Delicacy Co Ltd v. Heath* [1939]
61 CLR 457. Nevertheless, a concession was made by counsel in his written
submission in the following terms:
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It is accepted and conceded by the defendant that the general rule ... has been diluted in respect of partners to a joint venture. It is accepted that in Malaysia, the courts have accepted the principle that in certain circumstances, fiduciary duties are said to be owed from partners to the joint venture. See:

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- i. *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474;
- ii. *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481.

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However, in the present case, the defendant submits that the facts would negate any findings to the effect that the defendant owed the plaintiffs fiduciary duties in that the plaintiffs and the defendant never operated as partners in the joint venture. In a traditional “joint venture”, it would be seen that parties not only rely on each other but work closely to ensure the success of the project. In this case, the element of reliance on each other is not there. Instead, the other parties have contracted to form a “joint venture” for purely commercial purposes and the JV cum Shareholders Agreement expressly reflects this. The facts exhibit that the parties were not ... in a relationship “akin to a partnership” (as claimed by the plaintiffs). Hospital Penawar was a purely commercial venture and the plaintiffs and the defendant did not owe fiduciary duties to each other as revealed by the facts as follows:

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- i. The JV cum Shareholders Agreement expressly provides that the agreement does not create a partnership;
- ii. The JV cum Shareholders Agreement, expressly provides that the written Agreement constitutes the entire Agreement between the parties;
- iii. There were no similar clauses in the agreements forming the joint venture in *Newacres* nor *Hartela*;
- iv. The plaintiffs had majority shareholding in the JV Company (70%);
- v. The plaintiffs had majority control of the Board of Directors of the JV Company;
- vi. At all material times, the plaintiffs were in management control of the JV Company and since 2008 excluded the defendant company from any management role.
- vii. The plaintiffs contend that the defendant had not co-operated with the plaintiffs and the relationship was not cordial from the start.
- viii. The plaintiffs effectively completely took away any form of management control from the defendant since September, 2008 when the 2nd plaintiff was appointed Managing Director; and
- ix. No Hospital Administrator, who was to be approved by the defendant pursuant to the JV cum Management Agreement, was appointed since the 2nd plaintiff's appointment as Managing Director since September, 2008. This effectively excluded the defendant from any management role in Hospital Penawar.

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- A x. The plaintiffs also claimed that since appointment of the 2nd plaintiff as Managing Director and change in management as a result, Hospital Penawar's profits and growth rate improved to record levels.

B [27] It would seem from counsel's submission that the appellant's position was not based on a complete denial that a fiduciary relationship could exist between joint venture parties, but rather more a position that on the facts of this case, and bearing in mind the terms and circumstances of the JVSA, such a relationship could not be said to exist. Counsel was careful to impress on us that the joint venture on the facts of this case was not a "traditional" joint
C venture, but was a purely "commercial" joint venture, where the parties consciously agreed in the agreement that the relationship was not to be that of a "partnership". Article XVII of the JVSA was clear on this, providing:

Partnership

- D Nothing in this Agreement shall be deemed to create a partnership between the parties hereto.

Mutual Intention

- E The parties hereto recognise and accept that it is impracticable to provide herein for every contingency that may arise in the course of the performance of the terms and conditions contained in this Agreement or in the operation of the said development and accordingly they hereby declare it to be the mutual intention that in all cases they shall each of them use their best endeavours to ensure that this agreement shall operate as between themselves fairly and equitably.

- F [28] As regards the damages claimed and awarded by the High Court on the lower scale, the appellant denied that there was any breach of the JVSA since it was in the contemplation of the respondents that the appellant was in the business of providing services to privately-run hospitals, and the JVSA itself did not contain any non-competition clause, which the parties could have provided for. Further, the appellant had applied for and obtained approval
G from the Ministry of Health to set up the new hospital, and since the Ministry of Health was convinced that there was room for another hospital, there was no issue of any unequal or unfair competition. To quote from the written submission on this point:

- H The defendant had fulfilled the requirements contained in section 8 of the Act and obtained the requisite approval to operate the New Hospital pursuant to section 9 of the Private Health Care and Facilities and Services Act 1998.

- I ... Section 9 Private Healthcare and Facilities and Services Act 1998, provides that the Director-General in granting the approval shall consider certain factors:

- i. The nature of the healthcare facility or service to be provided.
- ii. The extent of which healthcare facilities or services or already available in an area.

iii. The need for the healthcare facility or service in an area.

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iv. The future need for the healthcare facility or service in an area or any other matter which in his opinion is relevant.

It is submitted that clearly, the Ministry of Health had considered that the healthcare facilities provided for by Hospital Penawar was insufficient to deal with the needs of the people in the Pasir Gudang area and has approved the setting up of the new hospital. Therefore, the New Hospital cannot be said to be in competition with Hospital Penawar.

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Accordingly, it is submitted that the defendant was not in breach of the JV Cum Shareholders Agreement nor was the defendant in breach of any fiduciary duties (if any are found to be owed by the plaintiffs to the defendant).

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[29] Turning to the quantum and the basis on which the damages were awarded, the appellant denied the damages for loss of profits here could be said to be a claim for “special damages”, and further, cast doubt on the veracity and accuracy of the calculations which led to the award of RM70,486,000 and interest thereon, arguing that the calculations were based on “estimates” and “projections” that had not been independently verified. The entire FHMH Report was argued to be “nothing more than an estimation and projection that is premised on a dubious basis”.

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[30] It is best to quote exactly what was submitted for better clarity:

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It is submitted that the learned that High Court Judge erred in not carefully evaluating and scrutinising the evidence of SP-4 and the FHMH Report. The learned High Court Judge erred in accepting the FHMH Report without even considering whether the basis of a report is acceptable and credible. As submitted ... the very basis of the FHMH Report is flawed and wholly erroneous. The plaintiffs as shareholders do not have rights to profits of the company. Here, the FHMH Report estimates the damages suffered by the plaintiffs based on the loss of profits that is “estimated and projected” to be suffered by Hospital Penawar for 16 years from 2014 to 2029. After arriving at the “estimated and projected” loss of profits suffered by Hospital Penawar for the years 2014 - 2029, the plaintiffs’ loss is calculated by multiplying the figures with 70% (being the shareholding of the plaintiffs in Hospital Penawar).

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Clearly, the whole method of calculating the plaintiffs’ purported damages is completely flawed, let alone, that the FHMH Report is nothing more than an estimation and projection that is premised on dubious basis. It is submitted that the FHMH Report ought to have been rejected by the High Court as the very basis of a report is flawed and cannot be accepted in law.

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[31] Lastly, an additional argument was advanced based on the non-termination of the JVSA by the respondents. The proper course for the respondents to take would be to terminate the JVSA and then claim for the damages.

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A *The Respondents' Submission*

[32] The respondents took a technical argument in relation to three of the principal grounds raised by the appellant which corresponded to Grounds 1, 5, 6, 15, 17 and 21 in the memorandum of appeal, arguing that these were unpleaded in the defence. These grounds were:

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(a) That the respondents as shareholders were only entitled to claim for dividends, not loss of profits as special damages;

(b) That the respondents could not claim for the damages without terminating the JVSA;

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(c) That the High Court was wrong to award the losses directly to the respondents when the losses were suffered by Hospital Penawar, not the respondents.

(d) That the respondents could not be the "proper plaintiffs" under the *Foss v. Harbottle* rule.

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[33] In particular, these grounds were not raised at trial, and it was not permissible to raise them at the appellate stage. As for the failure to terminate the JVSA, the respondents' stand was that they had a right in law to elect, consistent with s. 40 of the Contracts Act 1950.

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[34] Quite apart from these technical objections, the respondents maintained they were entitled to claim for the future loss of profits since these were calculated by an expert based on documents of Hospital Penawar. These were foreseeable damages claimable under s. 74(1) of the Contracts Act. It was a finding of fact by the High Court that these damages were within the contemplation of the parties, and this finding should not be disturbed. All the relevant source documents pertaining to the calculation of the damages were received in evidence, and were marked and admitted through the expert report. Further, the appellant had failed to call its own expert to challenge the expert report. The appellant had attempted to call the independent director of Hospital Penawar to be its witness but this was disallowed by the High Court. The appeal from this decision did not succeed in the Court of Appeal which dismissed the appeal. There was no application made thereafter to obtain leave to appeal to the Federal Court.

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[35] The High Court was satisfied that SP4 had been independent and fair in his conclusions. The figures used in the projections came from Hospital Penawar and these were never disputed by the appellant as a shareholder. The respondents referred in support to the answers given by SP4 in his testimony who explained why there was no need for an independent verification of the figures. See the following part of SP4's testimony during cross-examination which was highlighted to us by counsel for the respondents in the submissions:

YGS : Because you have not. You have confirmed to this Court, no independent verification has been carried out.

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HENG : Yes.

YGS : So, you have not carried out that duty, Mr. Heng, do you confirm that to the court?

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HENG : No, I disagree. I think if you look at some of the information, they are audited accounts done by fellow professionals. So, short of asking us to re-audit those audited accounts, we are not independently going and to look at those accounts and say, there is something wrong to it or not. So, what we are saying is that, look, there are documents there that have been provided to us. As long as on the surface of it, it doesn't look to be fake documents or documents that are not useful. We have carried out our opinion based on those sets of documents. And if you see my annexure, they are audited accounts signed by previous auditors or whoever the auditors are. We also enclosed legal documents and JV Agreement that are signed off by lawyers and so on. And brochures and things like that. So obviously I have not gone and verify each and every item in those documents to be a valid document. They are all signed off by fellow professionals ... (at p. 182, Appeal Record, Part B, Vol. 1)

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Evaluation

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[36] We gave due consideration to the opposing submissions, particularly in relation to the existence of a fiduciary relationship between the appellant and the respondents as joint venturers, and considered the full implications of acceding to the conclusions of the High Court on the award of the pleaded "special damages" for projected loss of profits for 16 years which came to a tidy sum of RM70,486,000, in a situation where the JVSA had not been terminated and on the assumption the parties would still be working together as shareholders in Hospital Penawar. To our mind, this outcome appeared unsatisfactory from a commercial perspective as well as on the law. An immediate question that comes to mind in this scenario is this: Since the respondents have "elected" not to terminate the JVSA, and at the same time would receive their proportionate entitlements to profits over 16 years, would they be in the same breath entitled to receive yearly dividends, or on whatever periodic basis, as may be decided by the company? Would the outcome of the High Court decision not be allowing the respondents to gain disproportionately and in advance of the profits for the alleged breach by the appellant of the JVSA? After all, if the articles of association are strictly followed, there can be no immediate entitlement to profits unless dividends are recommended by the directors and declared by the company. We refer here to arts. 108 to 115 of Hospital Penawar's Articles of Association. These are provisions which will be found in most companies limited by shares. We quote below some of the relevant articles under the heading "Dividends and Reserves":

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A 108. The company in general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors.

109. The directors may from time to time pay to the members such interim dividends as appeared to the directors to be justified by the profits of the Company.

B 110. No dividend shall be paid otherwise than out of profits or shall bear interest against the Company.

C 111. The directors may, before recommending any dividends, set aside out of the profits of the company such sums as they think proper as reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied, and pending any such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares in the company) as the directors may from time to time think fit. The directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide.

[37] It is trite that articles of association constitute a contractual nexus between shareholders *inter se*, and between the shareholders and the company, and thus in law, the present parties must be held bound by the articles, unless there are separate, clear provisions in any shareholders agreement between them. The JVSA contains no express provision qualifying or derogating from the normal rules of the company, as expressed in the articles of association, that dividends have to be declared out of profits as recommended by the directors with the proviso that the directors may set aside sums that they might think proper as reserves to be properly applied in the business of the company or for investment from time to time as they might think fit. The effect of the High Court judgment nullified these rules, and the overriding principle of law underpinning these rules that shareholders “have no interest, legal or beneficial over the property” of the company, as expressed in *Perman Sdn Bhd, supra*, and *Macaura v. Northern Assurance Co Ltd & Others, supra*, which were the authorities cited before us, and with which we agreed. As stated in *Perman Sdn Bhd, supra*, this is “a principle which lies at the heart of company law ... that a company is a separate legal person from its shareholders”. Profits are assets of the company and it was, with respect, erroneous for the High Court to have ignored this fundamental principle of company law. In this respect, it was timely of counsel for the appellant to have reminded us that on record, and based on the audited accounts, the total dividends declared by Hospital Penawar between the years 2008 to 2011 came only to an average of RM1,120,308 per year for the four years. These are actual audited figures. With respect, we found it difficult to accept that the respondents could then recover projected profits even on the lower scale of RM70,486,000 for 16 years, even accepting the assumptions and estimates in the HRMH Report could be accepted as valid. The figures simply did not add up. We had no

issue, however, to accept SP4 as an “expert” within the definition of s. 45 of the Evidence Act, despite submission to the contrary by the appellant. Nevertheless, it was incumbent on the High Court to have conducted a critical analysis of the HRMH Report.

[38] We assessed that report in some detail and considered the answers given by SP4 in his testimony. Nevertheless, all said, this was a report based on assumptions, estimates and projections that had not been independently verified, despite the explanation given by SP4 in his testimony. Being based on estimated losses and projections, the sums claimed as loss of profits could not be classified as “special damages” for the short reason that they had not been actually incurred, nor capable of exact calculation. We agreed with the appellant’s contention in this regard, that the respondents’ claim was fundamentally flawed.

[39] On the issue of fiduciary relationship and breach thereof, the law has been clarified in *Newacres, supra*, and we accepted the general proposition that in a joint venture, the joint venturers stood in a fiduciary relationship, but a distinction must be drawn between accepting the existence of a fiduciary relationship and determining the proper scope of that relationship on the precise facts and circumstances of each case. The law on fiduciary relationship in a joint venture is fact-sensitive. Even in *Newacres, supra*, the proposition of law was qualified. More recently, the English Court of Appeal has again recognised the fact-sensitive nature of such a relationship in *Ross River Limited & Blue River Limited Partnership v. Waveley Commercial Limited & Ors* [2013] EWCA Civ 910, where the Court of Appeal (per Lord Justice Lloyd) described the issue in the following terms:

... it is clear that, although the analogy with a partnership may suggest that fiduciary duties are owed in the context of a joint venture, the phrase “joint venture” is not a term of art either in business or in a legal context, and each relationship which is described as a joint venture has to be examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature ... (paragraph [34] of the Judgment)

[40] The English Court of Appeal referred to two earlier decisions in *Murad v. Al-Saraj* [2004] EWHC 1235 (Ch) and *Crossco No 4 Unlimited v. Jolan* [2011] EWCA Civ 1619, stating:

We were also referred to *Crossco No. 4 Unlimited v. Jolan* ... where Etherton LJ referred to his own decision in *Murad* as follows:

In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers. It is clear, however, that in special circumstances they can arise ... (paragraph [38] of the Judgment).

[41] The High Court, in our view, placed too high an emphasis on fiduciary duties being a *sine qua non* of a joint venture, and in so doing had not properly considered the joint venture on the facts of this appeal being essentially a

- A commercial joint venture, where elements of partnership between the parties were expressly excluded by agreement. It therefore became a matter of construction of the commercial contract between the parties to ascertain the scope of the fiduciary duties owed by the appellant to the respondents. The JVSA speaks of parties using their “best endeavours to ensure that this agreement shall operate as between themselves fairly and equitably”. In the total scheme of the JVSA, we did not believe there could be an iron-clad prohibition restricting the appellant from setting up the new hospital within the area in the absence of a “non-competition” clause. Had that been the intention of the parties, such a clause could have been easily included in the JVSA. In the context of this appeal, the scope of fiduciary duties could not be extended to the extent of rewriting the contract between the parties in the respondents’ favour, and it must be borne in mind, the respondents are majority shareholders and in control of management. In such a situation, it is best for the commercial conflicts between the parties to be resolved through the mechanisms provided in the JVSA itself, and not supplant these contractual provisions by equitable doctrines. The proper function is to uphold the bargain of the parties as expressed in the written agreement between them.

- E [42] As far as the argument relating to the respondents not being “proper parties” based on the *Foss v. Harbottle* doctrine, we did not believe this was the right approach to adopt. On the facts, and bearing in mind the joint venture relationship, if a breach could be substantiated, obviously the respondents as joint venturers would stand to lose their expected share of the profits through dividends payments. The alleged injury arising from the competition from the new hospital would affect both the company as well as the joint venturers/shareholders. As a matter of procedure, we did not believe this argument by the appellant had merit. By the same token, the decision in *Pioneer Haven, supra*, was not immediately relevant for this appeal. We allowed the appeal on the other grounds discussed earlier.

- G [43] As for the technical points raised by the respondents on the issues on the “proper party”, the flaw in claiming for expected loss of profits instead of dividends, and the failure of the respondents to terminate the JVSA prior to claiming for damages for expected loss of profits (all of which were either not pleaded in the defence, or raised during trial), and the exact fiduciary relationship between the parties, we did not believe these had merit in the circumstances of this appeal. These grounds were essentially issues of law that did not require the adduction of additional evidence beyond what had already been received during trial. We therefore agreed with the appellant’s argument that these were fundamental issues of law on admitted facts that were not in controversy. It was within this court’s discretion to allow the submissions in the interest of justice bearing in mind the facts and circumstances of the case (*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719). We noted

that as far as the issues pertaining to the fiduciary relationship was concerned, they were in fact raised in the High Court since submissions were requested by the court.

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Conclusion And Orders

[44] In conclusion, the appeal was allowed with costs based on the following grounds:

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(a) The High Court had failed to sufficiently consider the fundamental principle of company law that shareholders are only entitled to dividends declared out of profits within the terms of the governing articles of association, even in the context of a joint venture agreement;

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(b) The High Court had failed to sufficiently consider that even the JVSA did not expressly provide for any percentage share in the division of profits in the context of this fundamental principle of company law;

(c) The High Court had, in determining that a fiduciary relation must be a *sine qua non* of a joint venture arrangement, failed to sufficiently appreciate that on the facts of this case the joint venture arrangement was in the nature of a commercial joint venture, in which case it was incumbent on the High Court to have determined the exact contractual terms binding the parties and the fact that there was no “non-competition clause” restricting the appellant from setting up the new hospital, in a situation where the parties could have easily included such provision if that was the intention;

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(d) The High Court had failed to sufficiently appreciate that in commercial joint ventures, the issues of whether a fiduciary relationship existed and the scope of such relationship are fact-sensitive;

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(e) The High Court had failed to sufficiently critically analyse the HRMH Report by the expert (SP4), which report was essentially based on assumptions, estimates and projections that had not been independently verified, with the calculation of the projected loss of profits spread over 16 years being based on a fundamental flaw, ie, that the respondents as shareholders were entitled to a share of profits, which profits would be the assets of the company, not the respondents’, with the result that the actual estimated figures were far in excess of the average actual dividends per year declared between the years 2008 to 2011 which amounted only to an average of RM1,120,308 per year for the four years based on actual audited figures.

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(f) The High Court had therefore failed to sufficiently appreciate that given the extravagant sums calculated as projected losses for 16 years based on a flawed legal premise, the court should have rejected the expert opinion as inherently questionable or incredible.

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A [45] In the premises, we unanimously allowed the appeal and set aside the orders of the High Court. We awarded costs of RM200,000 here and below to the appellant. The deposit was ordered refunded to the appellant.

B [46] We also made a consequential order that the judgment sum and costs ordered by the High Court and kept in the account under the joint names of the solicitors for both parties, to be hereby released to the appellant.

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